STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2008
v	No. 278744 Wayne Circuit Court
SUNNY EWAN WILSON, Defendant-Appellant.	LC No. 07-005897-01

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for assault with intent to commit unarmed robbery, MCL 750.88, assault with intent to do great bodily harm less than murder, MCL 750.84, and domestic violence, MCL 750.81(2). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent sentences of 48 months to 25 years' imprisonment for the assault with intent to commit unarmed robbery conviction, 48 months to 25 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, and 93 days in jail for the domestic violence conviction. We affirm defendant's convictions and sentences, but vacate both the portion of the judgment of sentence requiring defendant to pay attorney fees and the final order for reimbursement of attorney fees and remand for further consideration on this issue.

Defendant first argues that there was insufficient evidence to convict him of assault with intent to do great bodily harm less than murder because he acted on impulse, rather than with a specific intent to harm his mother-in-law, Mattie Edwards (Edwards). Defendant asserts that the testimony of his wife, Mattie Wilson (Mattie) established, at best, that defendant pushed Edwards twice and that one of those pushes was "real hard." Defendant's frenzied conduct suggests his actions were unplanned and merely incidental to his struggle with his wife. Further, Edwards only received a broken ankle as a result of the incident, which does not support a conviction for assault with intent to do great bodily harm. Therefore, defendant argues that his conviction for assault with intent to do great bodily harm less than murder should be reversed.

In reviewing the sufficiency of the evidence, this Court views "the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). In reviewing a sufficiency challenge, we are mindful that the fact-finder had the special opportunity to assess the credibility

of the witnesses who appeared before it. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

"Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). We determine that there was sufficient evidence for the trial court to find beyond a reasonable doubt that defendant attempted with force or violence to do corporal harm to Edwards. Defendant pushed Edwards three times. Defendant slightly pushed Edwards the first time. Testimony indicated that defendant then took his forearm and physically pushed Edwards "real hard," which resulted in Edwards falling to her knees on the floor. Although Edwards kept trying, but was unable, to get up from the floor after the second push, defendant apparently felt the need to push or hit Edwards a third time, resulting in her being knocked all the way down to the floor. Despite the fact that Edwards could not get up, defendant continued to physically threaten her. After hitting Mattie repeatedly with his fists in the presence of Edwards, defendant walked over to Edwards and stood over her in a threatening manner. Although the testimony of defendant and the victim conflicted, resolution regarding the credibility of witnesses is reserved for the factfinder, which this Court will not second-guess. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). Because the testimony and evidence was clearly sufficient to support the verdict, defendant has no entitlement to relief.

Viewing the evidence in a light most favorable to the prosecution, the trial court was able to conclude beyond a reasonable doubt that defendant possessed the intent to do great bodily harm less than murder to Edwards. Edwards was 92 years old when these events occurred. Defendant pushed or hit Edwards three times. One of the pushes was described as being "real hard," and resulted in Edwards not being able to get off of her knees while on the floor. Before that act, defendant knocked a telephone out of Edwards' hand, precluding her from making a call. Defendant nevertheless felt the need to push Edwards a third time, although it was apparent that she could not rise from the floor following the second push. This third push knocked Edwards completely to the floor. Defendant's aggressive and violent actions toward the 92-year-old woman sufficiently establish that he possessed the intent to do great bodily harm less than murder to Edwards. Further, although defendant argues that Edwards only received a broken ankle and thus, his conviction for assault with intent to do great bodily harm is not supported, physical injury is not required for the elements of the crime to be established. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). Viewing the evidence in a light most favorable to the prosecution, the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Wilkens*, *supra*.

Defendant next argues that the multiple punishments strand of the double jeopardy clause is violated because the domestic violence charge does not require proof of any element beyond that necessary to prove assault with the intent to commit unarmed robbery. Therefore, because the two convictions are for the same offense, defendant's domestic violence conviction must be vacated.

Const 1963, art 1, § 15 states that "[n]o person shall be subject for the same offense to be twice put in jeopardy." "The analogous provision in the federal constitution, US Const, Am V, states that '[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of

life or limb . . . .'" *People v Smith*, 478 Mich 292, 298 n 4; 733 NW2d 351 (2007). As articulated by the Michigan Supreme Court:

> The Double Jeopardy Clause affords individuals "three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." The first two protections are generally understood as the "successive prosecutions" strand of double jeopardy, while the third protection is commonly understood as the "multiple punishments" strand. [*Id.* at 299 (citation omitted).]

This case involves the multiple punishments strand. In *People v Lugo*, 214 Mich App 699, 705-706; 542 NW2d 921 (1995), the Court indicated:

> In the multiple punishment context, both the federal and state Double Jeopardy Clauses seek to ensure that the total punishment does not exceed that authorized by the Legislature. Because the power to define crime and fix punishment is wholly legislative, the Double Jeopardy Clauses are not a limitation on the Legislature, and the Legislature may specifically authorize penalties for what would otherwise be the "same offense." Cumulative punishment of the same conduct does not necessarily violate the prohibition against double jeopardy under either the federal system or the state system. The determinative inquiry is whether the Legislature intended to impose cumulative punishment for similar crimes.
>
> Determination of legislative intent involves traditional considerations of the subject, language and history of the statutes. The court should consider whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and any other factors indicative of legislative intent. [Citations omitted.]

In *Smith*, *supra* at 296, the Michigan Supreme Court held that *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), "sets forth the proper test to determine when multiple punishments are barred on double jeopardy grounds." The *Blockburger* test provides that as long as each crime requires proof of an element that the other does not, there is no double jeopardy violation. *Id*. at 304.

The elements of the offense of assault with intent to commit unarmed robbery are: "(1) an assault with force and violence, (2) an intent to rob and steal, and (3) defendant being unarmed." *People v Reeves*, 458 Mich 236, 242; 580 NW2d 433 (1998); MCL 750.88. The elements of domestic violence require that "defendant and victim must be associated in one of the ways set forth in MCL 750.81(2); MSA 28.276(2) and that the defendant either intended to batter the victim or that the defendant's unlawful act placed the victim in reasonable apprehension of being battered." *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996); MCL 750.81(2).

Convictions for both assault with intent to commit unarmed robbery and domestic violence clearly do not violate the double jeopardy clause because each offense contains at least one element that the other offense does not. *Blockburger, supra* at 304. Assault with intent to commit unarmed robbery requires that defendant have the intent to rob and steal and that defendant must be unarmed. A conviction for domestic violence does not require that defendant have the intent to rob and steal nor does it require that defendant be unarmed. On the other hand, domestic violence requires that defendant and the victim be associated in one of the ways set forth in MCL 750.81(2). Assault with intent to commit unarmed robbery has no such requirement. Therefore, we affirm both convictions.

Defendant next argues that due process requires resentencing because the trial court enhanced defendant's sentence based on facts neither admitted by defendant nor proven to a jury beyond a reasonable doubt in violation of the rule of law set forth in *Blakely v Washington,* 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Michigan's sentencing guideline scheme was upheld by the Michigan Supreme Court in *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), which determined that *Blakely* does not affect Michigan's sentencing scheme. Thus, defendant is not entitled to resentencing.

Defendant finally argues that, because there is no indication in the record that the trial court considered defendant's ability to pay court-appointed attorney fees, the part of his judgment of sentence requiring payment should be vacated or this Court should remand this case for a hearing regarding his ability to pay. Because defendant failed to challenge the imposition of attorney fees in the lower court, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"[A] defendant may be required to reimburse the county for the cost of his court-appointed attorney." *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004). In *Dunbar*, this Court addressed whether the trial court must assess a defendant's ability to pay before imposing costs:

> The crux of defendant's claim appears to be that the trial court should have made a specific finding on the record regarding his ability to pay. We do not believe that requiring a court to consider a defendant's financial situation necessitates such a formality, unless the defendant specifically objects to the reimbursement amount at the time it is ordered, although such a finding would provide a definitive record of the court's consideration. However, the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay. The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay. A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered. [*Id.* at 254-255 (internal citations and footnotes omitted, emphasis in original).]

Because defendant failed to object to the trial court's order requiring defendant to reimburse the county for court-appointed attorney fees, the trial court was not required to make

formal findings of fact regarding defendant's ability to pay. *Id*. However, the trial court was required, but failed, to specifically indicate whether it considered defendant's ability to pay. The trial court did not refer to the financial and employment sections of the presentence investigation report nor did it mention defendant's future ability to pay. Therefore, both the part of the judgment of sentence that orders the repayment of attorney fees and the final order for reimbursement of attorney fees are vacated and the matter remanded to the trial court for reconsideration of defendant's ability to pay. We emphasize that the trial court need not conduct a formal hearing in this regard, but rather has the discretion to award attorney fees solely based on the record evidence. *People v DeJesus*, 477 Mich 996, 997; 725 NW2d 669 (2007).

We affirm defendant's convictions and sentences, but vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and the final order for reimbursement of attorney fees and remand solely for further consideration on this issue. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray